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IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

(484 - pet rehearing follows this)

No. 485

NATHAN SILVERMAN,

Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM 1945.

No. .....

NATHAN SILVERMAN,

Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, NATHAN SILVERMAN, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on July 10, 1946, (R. 2410), rehearing denied August 12, 1946, (R. 2440), affirming the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, entered on March 24, 1944, (R. 183), which sentenced petitioner upon a verdict rendered by a jury on March 10, 1944, (R. 132-133).

SUMMARY.

The indictment (R. 2), in seven counts, was returned September 4, 1942. It charged petitioner, together with thirteen others in Counts One, Two and Three with violating the Securities Act of 1933, being the Act of May 27, 1933, C. 38, Title 1, 48 Stat. 84, Sec. 17(a) (15 U. S. C. 77q); and in Counts Four, Five, Six and Seven with violations of the Mail Fraud Statute Criminal Code Section 215, (18 U. S. C. 338). All counts charged the same scheme differing only in the "mailings" specified. A verdict was directed by the court on Count Three, and Counts Six and Seven were dismissed. Defendants' motions for a directed verdict on Counts One, Two, Four and Five were denied. Nine of the defendants were brought to trial, convicted and sentenced. Petitioner was sentenced to serve six years; five years on Count Four, and one year on Count Five, with a sentence on Counts One and Two of five years to run concurrently with the sentence on Count Four. (R. 183, 184.)

OPINION OF THE COURT BELOW.

The District Court (Caillouet, D. J.) filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (per Hutcheson, C. J., R. 2397).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 10, 1946, (R. 2410), and a petition for rehearing was denied August 12, 1946, (R. 2440). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this court May 7, 1934, and *U. S. Ex Rel Coy v. U. S.*, 316 U. S. 342. So also Rule 37 Federal Rules on Criminal Procedure effective March 21, 1946.

STATUTES INVOLVED.

I. The Mail Fraud Statute, Criminal Code Section 215, as amended (18 U. S. C. 338), reads, in part, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than $1000.00 or imprisoned not more than five years, or both."

II. The Securities Act of 1933, Act May 27, 1933, C. 38, Title 1, 48 Stat. 84, Sec. 17(a); (15 U. S. C. 77q (a) (1)) reads, in part, as follows:

> (a) "It shall be unlawful for any person in the sale of any securities by the use of any means or

instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly * * *."

(1) To employ any device, scheme or artifice to defraud * * *."

SPECIFICATION OF ERRORS.

I.

(a) The court below erred in holding that this petitioner was a member of the comprehensive conspiracy as laid in the indictment; and after alternatively expressing doubt that he was a member of such conspiracy, further erred in holding that his substantial rights were not affected. The court erred in its alternative finding that if there were two conspiracies, one between Baker[1] and the other defendants, and another between petitioner, Baker and some of them, that the minor conspiracy in which petitioner was found to have been engaged in was so closely connected with the main, the general conspiracy, that the variance could not affect, and has not affected, petitioner's substantial rights. This finding requires a separate consideration of petitioner's status apart from that of his co-defendants who have independently applied to this court for writs of certiorari.

(b) In reaching this conclusion, the court below failed to consider the undenied fact that twenty-five separate conspiracies to defraud individuals were separately proven, and that petitioner concededly had no part in or knowl-

[1] Alleged to be the pivot around which the whole scheme revolved.

edge of sixteen of them; that of the other nine, he made some sales of land, but there is insufficient evidence to show that he had any connection with other alleged co-conspirators who later sold land, they being his competitors, who were able to learn the names of persons interested in purchasing when the deeds were recorded in public records, except as to three or four defendants in a few of the remaining nine separate smaller conspiracies with which petitioner was linked.

(c) The court further erred in holding *Berger v. U. S.*, 295 U. S. 78, controlling. That case was a single count conspiracy, whereas, our case is a seven count conspiracy. The principles of prejudicial error enunciated in *Kotteakos v. U. S.* ... U. S. ..., (90 L. Ed. 1178), are particularly applicable in that the jurisdiction of federal courts arises in this case by reason of the use of the post-office establishment of the United States. Proof of mailings on certain counts was imputed to petitioner by reason of the Circuit Court's alternative finding of his membership in a closely connected separate conspiracy, notwithstanding the court's expressed doubt that petitioner was party to the general conspiracy; hence, his substantial rights would necessarily be affected if he was not a member of the general conspiracy on each particular mailing count. A collateral conspiracy, even though closely connected, is insufficient to impute responsibility for a mailing, which is the gist of the offense.

II. The court erred in charging the jury on the law relative to the presumption of innocence, and on the law relative to reasonable doubt. The instruction erroneously

stated that the doctrine of the presumption of innocence did not extend to one who in fact was guilty; that the presumption of innocence will avail the defendants no further, so soon as *prima facie* evidence of the truth of the charges is presented to the jury; that the presumption is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established; that if such *prima facie* evidence, which so brushes aside the presumption of innocence is not met by the defendants' opposing satisfactory evidence, then that simple *prima facie* evidence, if it convinces the jury beyond a reasonable doubt, would justify the jury in rendering a verdict of guilty as charged, (R. 1703, 1716).[2] It is submitted that all of said instructions constitute basic error.

III. (a) The court erred in refusing the requested charge: that the failure of petitioner to testify in his own behalf does not create any presumption against him; that the jury must not permit that fact to weigh in the silghtest degree against him; *nor should this fact enter into the discussions or deliberations of the jury in any manner.* This, being in flagrant violation of the rule laid down by this court in *Bruno v. U. S.*, 308 U. S. 287, was reversible error.

(b) The Circuit Court erred in upholding the belated attempt of the Trial Judge to rectify this error after the jury had deliberated for six hours. Such belated instruction; telling the jury not to permit the fact that the de-

[2] The relevant portions of the charge which was challenged is quoted on p. 23 of this petition.

fendant failed to testify, to enter into the discussions or deliberation of the jurors; necessarily would be ineffective as the jury had already let that fact enter into their deliberation for six hours when the supplemental charge was given.

(c) Although proper exception and bill was reserved when the court refused to so charge, before the jury retired, the court below erred in holding that a second exception was necessary as such exception would have availed the court nothing further to correct; the fundamental error was a *fait accompli;* the damage done was then irrevocable.

(d) The Congressional mandate, upheld in the *Bruno* case *supra,* entitled petitioner as a matter of statutory right to such charge, and this clearly implies that he was entitled to it at a time when it would be effective, i. e., prior to the retirement of the jury for deliberation.

(e) In any event, the Circuit Court erred in not applying the proper test to determine the effectiveness of the correction made by the court; i. e., whether the error was so fundamental and serious as to affect the minds of the jury and thus disqualify them. Correction to be effective must be prompt. *Moreover, the court erred in giving no consideration at all to the rule that the deprivation of a right given accused by a specific command of Congress is presumptively prejudicial.*

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. In Holding that there was no Prejudicial Variance between the Indictment and the Proof, the Circuit Court has Decided an Important Question Affecting the Proper Administration of Justice in Federal Courts in a Way Probably in Conflict with the Recent Finding of this Court in Kotteakos vs. United States, ... U. S. ...; (90 L. Ed. 1178) Particularly in View of the Circuit Court's Alternative Finding that if Petitioner was not Engaged in the General Conspiracy, but was Engaged in a Minor Conspiracy, that the Minor Conspiracy was so Closely Connected with the General Conspiracy that Petitioner's Substantial Rights were Unaffected.

Preliminary Statement.

The indictment (R. 2) in seven counts charges fourteen persons, including petitioner, with a general scheme to defraud. This in law is a comprehensive conspiracy.[3] It is suggested that the alternative finding of the Circuit Court, to-wit: "If, however, we are mistaken in this, and there were two conspiracies, one between Baker and the other defendants and another between Silverman [petitioner], Baker and some of them, it is perfectly clear that the conspiracy in which Silverman was engaged, if it was a separate conspiracy, was so closely connected with the main, the general conspiracy, as that the variance could not effect and has not affected, his substantial rights and

[3] C/f *Pinkerton v. U. S.*, ... U. S. ..., 90 L. Ed. 1212; *Cochran v. U. S.*, (8 Cir.) 41 F. (2d) 193, 199, 200; *Mackett v. U. S.*, (7 Cir.) 90 F. (2d) 462, 464; *Baker v. U. S.*, (8 Cir.) 115 F. (2d) 533, 540; *Blue v. U. S.*, (6 Cir.) 138 F. (2d) 351, 359.

the principles laid down in *Kopald-Quinn Co. v. U. S.*, 101 F. (2d) 633, and *Berger v. U. S.* 295 U. S. 78 controls," requires a separate consideration of petitioner's status apart from that of his co-defendants, who have independently applied to this court for writs of certiorari.

The scheme concerns the sale as oil bearing and otherwise valuable land, which the indictment charges was sold through misrepresentations and fraud and that the land was swamp and marsh land of little value. The evidence showed transactions by individuals or in some instances separate groups of the defendants on widely varied dates occurring separately in many of the Southern States, particularly Louisiana, Mississippi, Florida and Tennessee.[4] The indictment (R. 2) alleges that:

> "It was a part of said scheme and artifice to defraud that the said defendants and the said confederate[5] would and they did own, dominate and control the Plaquemines Land Company, a Louisiana corporation, which said corporation had acquired and owned approximately 27,535 acres of unimproved marsh and swamp lands located in Plaquemines and St. Bernard Parishes, Louisiana."[6]

The Proof.

We submit that the jury could not possibly have found, upon the evidence, that there was only one conspiracy.

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[4] See the Appendix for chart relative to the relations of the defendants in each conspiracy.

[5] One of the defendants named was deceased, hence called "confederate".

[6] This was the key allegation from which one would suppose that the defendants were using that corporation to further their own ends. The allegation was abandoned, as the proof showed that defendant Baker owned the Corporation, (R. 1670), and that petitioner had nothing to do with it except to purchase land from it for cash.

Insofar as the aforesaid key allegation was concerned, it was abandoned *in toto* by the prosecution, as the proof showed that instead of the defendants owning, dominating and controlling that corporation it was actually owned by Baker.[7] It was sought to be shown, contrary to this key allegation, that each defendant was linked to Baker, who owned the corporation, in one or more transactions, and that it was possible for the jury to conclude that all were in a common adventure, because of this fact, as well as the similarity of purpose presented in the various sales of land. The similarity of this situation and the *Kotteakos* case is striking, for there this court said:

> **"The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similiarity of purpose presented in the various applications for loans."** [8]

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[7] The Plaquemines Land Co. was incorporated on March 4, 1911, a Louisiana corporation domiciled in New Orleans, Louisiana, (R. 1669, G. 413, R. 2291). Defendant Millard C. Baker owned 200 shares, L. L. Baker, 49 shares and G. H. Randolph 1 share. The capital investment was $25,000.00. (R. 1670.)

[8] Our brief, filed in the Circuit Court, long before the decision in the *Kotteakos* case was handed down, made the following statement:

"The Government contended that Baker was the pivot around which the other defendants moved, but, no evidence was offered except to show that Baker conspired with separate groups at certain times, but that in most of the transactions defendant had no part in nor knowledge of. Silverman was connected with Keifer & Silverman, Inc., (registered with and reporting to the Securities & Exchange Commission), a corporation dealing in the sale of oil royalties, oil lands, stocks and bonds, etc. Keifer was an officer in the United States Army at the time of trial—hence was not tried with the other defendants."

Quo ad petitioner, the proof utterly failed to establish the comprehensive conspiracy or general scheme as laid in the indictment. On the contrary, it showed a series of small conspiracies different and disconnected, and wholly apart from and without relation to others conspiring to do the thing forbidden. What the evidence offered by the Government did actually show was a series of numerous small conspiracies by certain groups of the defendants, but it did not prove nor connect up by proof the members of the several group conspiracies with one another, or, as stated in *Marcante v. U. S.* (C. C. A. 10) 49 F. (2d) 156, 157: *"It forged the links but failed to join them into a chain."*

The evidence in the case shows that Baker, the owner of the Plaquemines Land Co., dealt with petitioner at arms length. He sold the land to petitioner for a set price; demanding cash in advance. This is shown conclusively by reference to the indictment letters in Count I (R. 19) where the mail fraud count letters show that the deed to certain property purchased by petitioner was sent to the Deposit Guaranty Bank of Jackson, Mississippi, March 1941, the instructions being to deliver to petitioner the deed only upon his paying the sum of $112.50, plus charge of handling, which amount was to be remitted to the Plaquemines Land Co. The same method of handling the transaction is shown in the indictment letter of Count II (R. 21). This clearly shows that petitioner and Baker dealt at arms length, not as principal and agent nor as collaborators. The other defendants had access to the public tax and conveyance records, and could ascertain who had made a purchase of the land and could have con-

tacted them on their own account in an effort to sell a prospect who had previously purchased.[9] There is no evidence that any division of profits was made among the alleged conspirators.[10]

Argument.

There was no clear and consistent theory as to petitioner's connection with the fraudulent scheme. If this was not a general comprehensive conspiracy, it was highly prejudicial and highly improper for the Court to charge as binding upon petitioner the acts of others happening in different cities and between widely different dates. This is not such a case, e. g., the key man owns and operates a bucket shop and employs salesmen to work on a salary or commission basis, they being schooled to carry out the comprehensive plan or conspiracy, all contributing in varying degrees to the success of the unlawful enterprise. The evidence in this case plainly shows that petitioner had no other purpose in mind than that of carrying out his own individual operations, sometimes co-operating with three or four of the other defendants.

True, the Government need not prove all it alleges, but it does have the burden of proving that petitioner was a member of a single comprehensive conspiracy to violate the laws charged. It is not sufficient to merely prove that one group among those indicted, conspired with Baker in

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[9] This, of course, is a self-evident fact, and it was natural that as competitors their paths at times crossed.

[10] It is most significant that none of the defendants testified for the Government which is usual in cases where a large group is in an actual conspiracy, e. g., the testimony of Brown, spoken of as "the common center" around whom the spokes of the wheel met in the *Kotteakos* case.

one locality on one day, and petitioner and another group conspired with Baker in another locality on another date in separate conspiracies. Even if it were conceded *arguendo* that Baker, as owner of the Plaquemines Land Co., was engaged in a broad single conspiracy rather than several individual ones, it would not follow that petitioner was so engaged.

The Government's strategy of holding a mass trial has by force of numbers and transactions built up a record that was intrinsically prejudicial to petitioner. This method of proceeding was selected in preference to securing separate indictments of the separate groups shown to have conspired to violate the law. The Government sought to submit the question of guilt as to all of the defendants in one indictment notwithstanding the fact that the testimony as to each was different.[10a] Long before the *Kotteakos* case, it had been stated by federal courts that this practice is not to be encouraged because of the confusion produced and the extreme difficulty for even an experienced trial judge to protect the individuals charged. Further, that with inexperienced jurors, such complicated testimony was apt to become a confused jumble, giving the jurors the impression the defendants are guilty of something, with little reference to the crime with which they are charged.[11]

[10a] See the ruling in the bill of exception taken (R. 1094) wherein the Court ruled that all of these defendants having been charged with entering into a scheme and artifice to defraud together were effectively charged with a conspiracy. See also the extensive general charge of the court on the law relating to conspiracy beginning on R. Page 1708.

[11] *Marcante v. U. S.*, (10 Cir.) 49 F. (2d) 156; c/f U. S. v. McConnell (D. C. 285 F. 164, 165; *Tinsley v. U. S.*, (8 Cir.) 43 F. (2d) 890; *Linde, et al. v. U. S.*, (8 Cir.) 13 F. (2d) 59, 61.

The Government contended that it had proven the general comprehensive conspiracy by circumstantial evidence, consisting of the proof showing that the defendants called upon the purchasers of the land (sometimes separately and sometimes in groups of two or more) in an effort to induce a purchaser, who had already purchased land, to make additional purchases by pretending to be interested in purchasing the holdings at a profit.[11a] Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of an appellate court to reverse the judgment of conviction.[12] We submit that the evidence in this case does not exclude every reasonable hypothesis that petitioner was a member of the general conspiracy charged. Even in those cases where other defendants sought to sell a purchaser more land it is a fair inference they did so on their own account by obtaining the information that the purchaser had already purchased some land from the public records, or two of the defendants may have independently conspired to defraud the purchaser without the knowledge of petitioner, or petitioner and another could have so conspired without the knowledge of the others. Unless they were connected up with the general scheme they should not have been convicted under this indictment.

It is to be noted that the Circuit Court on page 12 of its opinion states specifically that as to *all* the defendants *but petitioner* the record leaves no doubt that they formed

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11a This is sometimes termed "loading and reloading".

12 *Wright v. U. S.*, (8 Cir.) 227 F. 855, 857; *Turinetti v. U. S.*, (8 Cir.) 2 F. (2d) 15, 17; *Edwards v. U. S.*, (8 Cir.) 7 F. (2d) 357, 360; *Ridneur v. U. S.*, (3 Cir.) 14 F. (2d) 888, 892, and cases cited on p. 893; *Haning v. U. S.*, (8 Cir.) 21 F. (2d) 508, 510; *Siden v. U. S.*, (8 Cir.) 9 F. (2d) 241, 244; *Tinsley v. U. S.*, (8 Cir.) 43 F. (2d) 890, 897, 898.

one conspiracy. That court evidently reached such conclusion after consideration of the record and an examination of a chart of the testimony of the witnesses made part of petitioner's brief in that court.[13] The chart graphically illustrates that out of twenty-five conspiracies proven, petitioner had no part in sixteen of them; in the remaining nine, he is shown only to have been connected with a few of the other defendants in four instances; as to one of the defendants, Baker, the key or pivot man, the Circuit Court recognized that there is evidence that petitioner dealt at arms length with him.

In applying the *Berger* case[15] the Circuit Court failed to take into consideration the fact that the indictment here was in seven counts charging a substantive offense[16] instead of on one conspiracy count as in the *Berger* case. If petitioner was not shown to be actually a part of the general scheme or conspiracy on any one count it was improper to impute to him the mailing, which is the gist of the offense, no matter how closely connected the separate conspiracy referred to by the Circuit Court was to the general conspiracy. The mailing is jurisdictional.[19]

In sixteen instances the proof of separate conspiracies were improperly imputed to petitioner, and *a fortiori* all mailings connected with such conspiracies. The nine instances implicating petitioner as shown on the chart consist of some cases where petitioner made sales to the

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[13] A similar chart is reproduced in the Appendix to this petition.
[15] Holding that even if there was a variance that it was not prejudicial, and did not affect petitioner's substantial rights.
[16] However, the law relating to conspiracy governed the evidence and procedure.
[19] A scheme to defraud minus the mailing would constitute no offense under the federal statutes; hence, the mailing is jurisdictional.

persons to be defrauded, and in which thereafter other defendants, *at later dates*, independently of petitioner, made similar sales, but in several instances of the nine, petitioner was shown to have acted in cooperation with a few of the other defendants.[20] These facts show a prejudicial variance by the very nature of the confused state of such a record.[21]

In the *Kotteakos* case, this court said that it was one thing to hold harmless the admission of evidence which took place in the *Berger* case where only two conspiracies were proven involving four persons, but an entirely different thing to apply the same rule where there were many conspiracies and many defendants. In our case, of course, there were twenty-five separate conspiracies involving fourteen defendants, out of which nine were ultimately brought to trial and convicted.[22] The evidence involving the acts of the others was offered on the trial of the case and the court charged and the prosecuting attorney argued that all of the acts and statements of the co-defendants whether on trial or not were to be imputed to petitioner.

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[20] See footnote to the Chart in the Appendix.

[21] Petitioner was forced into the kind of mass trial condemned in the *Kotteakos* case where he did not, by any acts of his own, invite or deserve such a trial.

[22] None were acquitted. The other defendants either died or were granted severances. This was a most involved fraud case lasting about two weeks, including night sessions. It was not a simple case like the *Berger* case, supra, and was much more involved than the *Kotteakos* case appeared to be. The Circuit Court points out the damaging character of the evidence which if wrongly imputed to a petitioner would necessarily affect his substantial rights as follows:

"They point particularly to the damaging character of the proof presenting a record of despicable meanness, of trickery, artifice and fraud, portraying some of the defendants as common swindlers, their activities directed to stripping to the point of impoverishment the old, the helpless, and the ignorant."

As pointed out by this court in the *Kotteakos* case the sheer difference in numbers, both of defendants and of conspiracies proven distinguishes the situation from the *Berger* case, *supra;* obviously the burden of defense to a defendant connected with one or a few of so many distinct transactions is vastly different not only in preparation for trial, but also in looking out for and securing full safeguards against evidence affecting other defendants, to prevent its transference as "harmless error" or by psychological effect, in spite of instructions for keeping separate transactions separate.

It appears that where, as in our case, jurisdiction is based solely on the use of the mails, that a fraud conspiracy should be held within narrow limits to carefully maintain jurisdictional bounds, remembering always that the use of the mails is the gist of the offense.

The charge of the court made no attempt to keep the conspiracies separate nor even to keep separate the individual counts. The court charged that petitioner was responsible for the acts of the co-defendants if the jury found that any *two* or more defendants entered into an agreement to accomplish an unlawful purpose, from which abstract charge the jury could not have possibly understood the concept of "general conspiracy" as defined by this court in the *Kotteakos* case, (R. 1708). The same type of charge was given as to the mailing. (R. 1733.)

Thus it is again seen that even as to the mailing no attempt was made to keep the conspiracy separate, nor even to keep separate the counts, each of which charged a

separate use of the mails in a separate conspiracy. It appears that this case is even more aggravated than the *Kotteakos* case. Here petitioner is charged in a scheme to defraud by use of the mails, and out of twenty-five conspiracies proved petitioner admittedly had no part in sixteen of them. It would thus seem that the result is tantamount to convicting petitioner, not solely for what the evidence showed he was guilty of, but for offenses committed independently by others as well.[23] As this court further held in that case, the inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error, it is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. It thus could not be fairly argued that the evidence in the sixteen instances of fraud irrelevant to petitioner did not influence the result, particularly in view of the court's charge that he was bound by what other defendants said or did where two or more persons conspired (R. 1708). Even if he were not in the general conspiracy, he was, under this indictment and the theory of the District Court, improperly held responsible for all mailings whether the proof showed that he was a part of the conspiracy on that specific count or not. See court's charge (R. 1733).

The Circuit Court seeks to distinguish the *Kotteakos* case on the ground that the variance claimed there was

[23] In the *Kotteakos* case the maximum sentence for a conspiracy was 2 years and the defendants were given 13 months—less than the maximum. For violating the Mail Fraud Statute 5 years is the maximum, but petitioner was given 6 years. The one year extra on imputed guilt emphasizes the danger of applying the harmless error statute to a multi-count conspiracy indictment on the theory that a defendant, though not a party to the general conspiracy, is a party to a smaller conspiracy which is closely connected.

conceded, and that there were many wholly unrelated separate conspiracies shown. There was nothing in the Government's brief filed below in reply to the chart reproduced in the Appendix demonstrating conclusively that petitioner was not implicated in sixteen separate conspiracies proved by the Government. *As this was not controverted, we take it that the Government did concede that as to petitioner, at least, those sixteen acts were wholly unrelated, separate conspiracies, and that petitioner had no part in them. Yet he was held responsible for them, at least on the alternative finding of the Circuit Court, on the theory that those separate conspiracies are closely connected.*

The Circuit Court found that petitioner was not an agent of Baker, but a collaborator with him.[24] The record shows, on the Government's own evidence,[25] that petitioner purchased the land which he sold from Baker, paying cash. Baker forwarded the deeds which he sold petitioner to a bank, sight draft for the purchase price attached. That evidence appears upon the face of the indictment itself. (Examine the indictment letters, Count One (R. 19) and Count Two (R. 21). It is true that in one instance

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[24] The Circuit Court conceding that petitioner was not part of the general conspiracy, used this language, "As to *all* the defendants but Silverman [petitioner] the record leaves in no doubt that they formed one wolf pack. * * * As to Silverman, on the record perhaps the chief rascal of them all, there is evidence tending to show that he was not an agent of Baker but a collaborator with him, and as to some of the actions, there is evidence giving an appearance of their dealing with each other at arms length." Quere; since the court excepted petitioner from the "wolf pack", (general conspiracy) was it because the court could not from the record fairly include him in the general conspiracy that he was characterized as the chief rascal of them all?

[25] Petitioner offered no evidence at the close of the Government's case, but relied on his defense that he was not a party to the comprehensive conspiracy as laid in the indictment. His motion for directed verdict on this ground was denied.

petitioner was with Baker in some dealings with Mrs. Carter (R. 356)[26] but we submit that there is nothing in that testimony to show that Baker was collaborating with petitioner in a comprehensive conspiracy. Even all of this would fall far short of making petitioner responsible for the separate acts and conspiracies of other persons who may have separately conspired with Baker.

Count Four (R. 28) shows the mailing on June 27, 1940, of a check by a bank, which check is made payable to a co-defendant Diaz, for land which he sold to Fowler in 1940. There is no showing that petitioner even knew that Diaz made this sale or received this money. Petitioner individually last had dealings with Fowler in July, 1938, (R. 1194), yet he is held responsible for a mailing not involving him, on a separate transaction occurring two years later on the theory that he is a co-conspirator. Like the *Kotteakos* case, this view embodied throughout the instructions obviously confuses the common purpose of a single enterprise with the several purposes of numerous separate adventures of like character.

No instructions were given that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy. It was not sufficient that the court caution the jury, as it

[26] This is the only evidence in the record that we can find that would in any manner justify the court's statement that petitioner was a collaborator of Baker. Everything else shows that they dealt at arms length. That evidence merely shows that Baker and petitioner and Kahn visited Mrs. Carter together in the year 1937. The record shows that Baker made monthly payments to Mrs. Carter over a long period of time. Mrs. Carter had dealt with petitioner on oil royalty transactions and it could be fairly assumed that petitioner induced Baker to assist Mrs. Carter in recouping some of her losses. (R. 356.)

did in this case, to consider each defendant's case separately and to determine his participation in the scheme charged. It obviously does not and could not go to keeping distinct conspiracies distinct, in view of the theory of the case as laid in the indictment, as charged by the court, and argued to the jury by the District Attorney, and, of course, all of this also went to the essential proof of mailing. The jury understood that if any *two* or more persons conspired together the defendants could be convicted. Concededly the evidence showed that much—the challenge here, however, is that it showed separate group instances of this.

The Circuit Court held squarely that this case is governed by the *Berger* case and not the *Kotteakos* case. Of course, if petitioner was a member of the general conspiracy, a reference to those cases was irrelevant. It was only because the court had a doubt about petitioner's connection that it found it necessary to discuss the cases at all. In comparing the *Berger* with the *Kotteakos* case, this court in the latter case stated that obviously a much greater stretch of the imagination is needed to regard an indictment charging thirty-six people with conspiring together, than was needed to say that one charging four as agreeing with each other in terms covering each of two agreements by three or four, one conspirator being different in each proved offense. And even more would be needed to look upon the former as charging eight or more conspiracies than upon the latter as indicting for two. In petitioner's case the situation is even more aggravated with twenty-five separate conspiracies involving fourteen co-conspirators. This court in no uncertain terms has proscribed the heretofore all too prevalent practice of

conducting mass trials wherein a great number of persons are charged as co-conspirators though having no connection with one another, in separate conspiracies, and pointed out that: "Numbers are vitally important in trials, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies." This court then pointed out that when many conspired that they invite mass trial by their conduct, but that wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group. The court went on further to say:

> "Criminals they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

II. In Upholding the District Court's Charge Concerning Reasonable Doubt and the Presumption of Innocence, viz: (a) That the Presumption of Innocence Does Not Apply to a Defendant who is in fact Guilty so that He May Escape Just Punishment; (b) That said Presumption becomes Inapplicable as soon as Prima Facie Evidence of the Truth of the Charges is Presented to the Jury; (c) That said Presumption is No Evidence At All and Plays Its Part Only So Long as there is Absence of Legal Evidence as to the Particular Fact to be Established; (d) That Reasonable Doubt is a Doubt for which a Reason may be Given; the Circuit Court has Decided an Important Question of Federal Law Probably in Conflict with Applicable Decisions of other Circuit Courts of Appeal and of this Court.

Preliminary Statement.

The court charged the jury concerning the presumption of innocence as follows (R. 1703):

> "The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each of the defendants as stated beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, **it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one WHO IN FACT IS GUILTY, so that he or she may escape just punishment.** The rule is but a humane provision of law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this presumption of innocence, when, once having retired to deliberate upon your verdict, you review, weigh and consider the

whole body of the evidence. As I have stated, the burden rests upon the government, remember, to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. **But this presumption of innocence will avail the defendants no further, so soon as prima facie evidence, of the truth of the charges laid against them in the indictment is presented to the jury. That prima facie evidence, if it satisfies the jury, beyond a reasonable doubt, of the guilt of the defendants bars the presumption of innocence, BECAUSE THE PRESUMPTION IS NO EVIDENCE AT ALL, AND PLAYS ITS PART ONLY SO LONG AS THERE IS ABSENCE OF LEGAL EVIDENCE AS TO THE PARTICULAR FACT TO BE ESTABLISHED. If such prima facie evidence, which so brushes aside the presumption of innocence when found worthy of belief by the jury, is not met by the defendants' opposing satisfactory evidence, then that simple prima facie evidence, if it convinces you gentlemen of the jury, as the final judges of the fact, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilty as charged."** (Emphasis supplied.)[27]

That charge must be considered in connection with the Court's definition of reasonable doubt as given to the jury.

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[27] In *Gomila v. U. S.*, (5 Cir.) 146 F. (2d) 372, this identical charge read from the same manuscript by the same Trial Judge was by this same Circuit Court held to be reversible error, even in the absence of a particularizing exception.

See *Coffin v. U. S.*, 156 U. S. 432, 458-462, holding it reversible error for Court to refuse to charge that the presumption of innocence was evidence in defendant's favor to be considered along with evidence offered by the prosecution. A careful analysis of the history and philosophy justifying this basic rule will be found in that case. Per contra; the Court in this case charged that presumption was not evidence and was brushed aside when prima facie evidence was offered by the Government.

Ezzard v. U. S., (8 Cir.) 7 F. (2d) 808, 811, and *McAdams v. U. S.*, (8 Cir.) 74 F. (2d) 37, 40, holds it reversible error to charge that the "prima facie rule" applies in a criminal case.

The Court, in part, defined reasonable doubt in the following language (R. 1716):

> "Now with reference to 'reasonable doubt'. **Reasonable doubt is a doubt for which a reason may be given.** A doubt growing out of the evidence and the circumstances of the case; it is an honest substantial misgiving as to the existence of a fact, generated or born out of an insufficiency of proof to establish a fact."

Circuit Court Erred in Stating Trial Court Corrected Errors in Charge.

The Circuit Court erred in stating that the trial Court corrected the error in the charge. Perhaps that statement has reference to (R. 1723) where counsel for one of the defendants raised a question relative to the court's statement that proof of guilt should be made by *prima facie* evidence, at which time the court added a statement that the *prima facie* evidence must be established beyond a reasonable doubt to warrant a verdict of guilty.

Argument.

It is improper for the court to speak of proving guilt in a criminal case by "simple *prima facie* evidence" [28] even when there is added the requirement that the proof be beyond a reasonable doubt, and such a statement falls far short of correcting the statement that restricts the rule of presumption of innocence to innocent persons only, and

[28] "Simple prima facie evidence", a highly technical legal term, was not defined and a lay jury could hardly be expected to appreciate its legal significance.

tells the jury that it does not extend to persons who are in fact guilty. Guilty of what? A layman would be justified in believing that if the defendant was guilty of any crime regardless of the nature of the charge that the rule would not apply. It likewise falls far short of correcting the charge that "the presumption of innocence is no evidence at all"; that simple *prima facie* evidence brushes it aside.

We think it would make no difference how many times a judge gave the abstract, orthodox form of instructions when he so qualifies the instruction by telling the jury specifically that the presumption of innocence is "no evidence at all" and that it "does not extend to a person who is in fact guilty". By such statements the whole trial becomes tainted; the traditional method of arriving at a just verdict in a criminal case fails. The court never at any time told the jury to disregard his erroneous statement relative to the presumption of innocence not extending to a person who is in fact guilty, and that it was brushed aside by *prima facie* evidence, and that the presumption was no evidence at all.

This Court, in Coffin v. U. S., 156 U. S. 432, 458-462, Differentiates Between "Reasonable Doubt" and "Presumption of Innocence" Rule. The Presumption of Innocence is Evidence.

Mr. Justice White in a most scholarly discussion of the "presumption of innocence" doctrine in *Coffin* case *supra*, pointed out that the presumption is an instrument of proof created by law in favor of one accused, whereby his innocence is established until sufficient evidence is intro-

duced to overcome the proof which the law has created. In short that the rule of presumption of innocence is evidence. The court said:

> "This presumption on the one hand, supplemented by any other evidence he [the accused] may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn."
>
> "Greenlief thus states the doctrine: 'As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, **as matter of evidence, to the benefit of which the party is entitled.** (Emphasis by the court.)
>
> "This presumption is in the nature of evidence in his favor [i. e., in favor of the accused], and a knowledge of it should be cummunicated to the jury."
>
> "* * * presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt makes more apparent the correctness of

> these views and indicate the necessity of enforcing the one, in order that the other may continue to exist."

Therefore, when the court instructed the jury that the "presumption of innocence was no evidence at all" it excluded an important element of proof, and this likewise was recognized in the *Coffin* case, *supra.*

Here the court even went further than in the *Coffin* case for there, as the opinion will show, the Court fully and correctly instructed on reasonable doubt, but not so in our case, as we shall attempt to show hereafter.

It was also basic error for the court to instruct that the "*prima facie* rule" applied, and that basic error was magnified by the added statement that "simple *prima facie* evidence brushes aside the presumption of innocence when found worthy of belief by the jury".

In civil cases presumptions may sometimes fix the *onus probandi,* but not so in criminal on the main issue. There, the burden and quantum of proof to establish the *corpus delicti* and defendant's guilt never shifts,[29] and a *prima facie* case is unknown in criminal procedure,[30] and in no condition of the proof is it permissible to instruct a jury that it had become the duty of defendant to establish his innocence to obtain an acquittal. The fact of his innocence might arise from the evidence established by law—the presumption of innocence—or by evidence of good char-

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[29] *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266, 267; *Davis v. U. S.*, 160 U. S. 469, 487.

[30] *Ezzard v. U. S.*, (8 Cir.) 7 F. (2d) 808, 811; *McAdams v. U. S.*, (8 Cir.) 74 F. (2d) 37, 40.

acter, or the unsatisfactory nature of the proof offered by the Government when considered together with the presumption of innocence evidence.

It was gross, basic and fundamental error for the court to deprive petitioner of this most important right to a fair trial.

Erroneous Instruction on Presumption of Innocence Aggravated When Coupled With Erroneous Instruction Defining Reasonable Doubt as Being "A Doubt For Which A Reason Can Be Given".

We submit that this error is aggravated when it is coupled with an erroneous instruction defining reasonable doubt, and that it was error to charge that reasonable doubt is *"a doubt for which a reason may be given."* (R. 1716.)

That form of instruction has been the subject of continuous challenge in the jurisprudence of the Federal Court, as well as that of the State Courts. As far back as 1912, the Circuit Court of Appeals for the 8th Circuit [31] reversed a conviction because the Court disapproved such a charge, which required a juror to give a reason for his doubt before he could acquit a defendant.

The basis of the court's finding was that, if each juror was required to give a reason for his acquittal and for his doubt, he must give a sound reason based on the evidence or want of it. The question then arises as to whether or not this sound reason must be sound in his own mind

[31] *Pettine v. Territory of New Mexico*, (C. C. A. 8) 201 F. 489, 495.

only, or, in the opinion of his fellow jurors, or of the judge; that the ability to give sound reasons for their doubts or beliefs is not given to many men, as it is a matter of common knowledge that in the important affairs of men, doubts for which he can formulate no convincing reason, often induces him to act or to refuse to act. That to require any person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the evidence or lack of evidence and the circumstances of the case for his doubt of his guilt before he may vote for his acquittal, places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it.

It was pointed out in other cases that a doubt arising out of evidence is a mental operation for which it may often be very difficult and indeed impossible to assign any reason and yet, if honestly entertained by the jury in a criminal case, must be acted upon because they are only authorized to bring in a verdict of guilty when they are satisfied and convinced beyond a reasonable doubt of the guilt of the accused.

In other cases, it was said that where the jurors were required to assign a reason in the mind (a mental process), such would be quite different from expressing a reason, the latter of which may be beyond the ability of many men, but even that form of instruction was disapproved.

We are citing below all of the Federal cases on this point that our research has disclosed.[32] Some of the Circuit Courts have reversed convictions holding this charge constituted prejudicial error; others disapproved the charge but held that the accused was not prejudiced, thus establishing a definite conflict in the federal jurisprudence on an important question in the administration of Federal Criminal Procedure, which, as far as we have been able to find, has not been, but should be, resolved by this court.[32a]

It is true that no exception was taken to this charge, but the Fifth Circuit Court heretofore has regarded a proper instruction on "reasonable doubt" as so sacramental that it *ex proprio motu* reversed a conviction in *Lambert v. U. S.*, (C. C. A. 5) 101 F. (2d) 961, 964, because of an erroneous instruction on "reasonable doubt", *although, according to the dissenting opinion, p. 967 id., no objection, exception, assignment of error, nor even argument, either oral or in brief, was presented to the court.* C/f *Ward v. U. S.*, (C. C. A. 5) 96 F. (2d) 189, 192. The right of the appellate court to correct basic error in the absence of an exception is well settled.[32b]

It appears that the trial court went entirely too far in giving both of the instructions mentioned above, in an attempt to limit and restrict the scope of the rules relative

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[32] *Pettine v. Territory of New Mexico*, (8 Cir.) 201 F. 489, 495; *Owen v. U. S.*, (9 Cir.) 130 F. 279, 283 (citing cases from State Courts); *Ayer v. Territory of New Mexico*, (8 Cir.) 201 F. 497; *U. S. v. Wood* (2 Cir.) 66 F. (2d) 262, 265; *Griggs v. U. S.*, (9 Cir.) 158 F. 572, 578; *Murphy v. U. S.*, (3 Cir.) 33 F. (2d) 896; 23 C. J. S. Sec. 1280, 1268; *Mansfield v. U. S.*, (8 Cir.) 76 F. (2d) 224.

[32a] Note that the Circuit Court expressed a doubt that such a charge was improper in this case.

[32b] *Brasfield v. U. S.*, 272 U. S. 448, 450; *U. S. v. Atkinson*, 297 U. S. 157, 160; *Gomila v. U. S.*, (5 Cir.) 146 F. (2d) 372.

to "reasonable doubt" and "presumption of innocence". It was said in the *Pettine* case, *supra*, that in the trial of an important case it is unwise to depart from established and approved definitions to doubtful declarations and novel theories.[33] Or, as it was expressed in *Paddock v. U. S.*, (C. C. A. 9) 79 F. (2d) 872, 877, the Court, in discussing the doctrine of "reasonable doubt" said:

> "We are inclined to agree with the statement of Justice McFarland, speaking for the Supreme Court of California in People v. Paulsell, 115 Cal. 6, 46 P. 734: 'If experimental departures from the well established language sanctioned by all Courts upon the subject of reasonable doubt are to be here allowed, and each trial Court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel."

III. In Overruling the Claim that the District Court Erred in Refusing to Charge the Jury that the Failure of the Petitioner to Testify Should Not Create a Presumption Against Him, and Should Not Be Used in the Discussions or the Deliberations of the Jury, Until the Jury Had Deliberated About Six Hours, the Circuit Court of Appeals has Decided a Federal Question Involving a Congressional Command or Policy Probably in Conflict with a Decision of this Court, to-wit: Bruno v. U. S., 308 U. S. 287.

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[33] In the case at bar none of the defendants testified or offered any evidence in the case, preferring to stand on the legal proposition that no comprehensive or general conspiracy had been proven. How could the jury be expected to formulate a reason and express it when the defense offered no evidence at all?

Preliminary Statement.

Petitioner steadfastly contended, first on demurrer to the indictment, and again and again on objections to evidence from time to time throughout the trial, and then on motion for directed verdict, and finally on appeal to the Circuit Court that he was not a party to the comprehensive conspiracy as laid in the indictment. He made no defense relative to the misrepresentations nor to the fraudulent scheme *vel non*. The only controverted factual issue before the court was whether petitioner was a member of the so-called alleged *"general scheme"*.

Petitioner, believing that the Government had failed to prove that he was a member of the *"general scheme"* or conspiracy did not testify, nor did he offer any evidence whatsoever, but elected to stand on that legal defense.[34] Counsel for petitioner requested the instructions relative to the defendant's failure to testify that this court has held he was entitled to have. *Bruno v. U. S.*, 308 U. S. 287. The court, in the presence of the jury, refused to give the instructions, adding, "It is refused for I think it is elementary."[35] Thereupon, a bill of exceptions was reserved. (R. 1725.)

After the jury had deliberated for six hours, they returned to ask for instructions on another matter (R. 1731). Those instructions showed that, as to several defendants, the jurors had made up their minds and found them all

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[34] All other co-defendants followed the same course. No evidence of any kind was proffered by petitioner or his co-defendants.

[35] Meaning, of course, that it was elementary that petitioner was not entitled to have the jury instructed that they were not to use the fact of the defendants' failure to testify in their deliberations, a most unfortunate and damaging deprivation of a plain right.

guilty. The court, after replying to the jurors' question, did *ex proprio motu* additionally give the instructions to the jury which were held to be essential in the *Bruno* case, *supra*, (R. 1736-1739.)[36]

Argument.

In *Bruno v. U. S.*, 308 U. S. 287, this court unequivocally held that a defendant not taking the witness stand was, as a matter of absolute statutory[37] right, entitled to an instruction that no presumption was created against him because of his failure to testify—and more important still —*the jury should be instructed that this fact should not enter into the discussions or deliberations in any manner.*[38] This court further held that the failure to give such a requested instruction was *presumptively prejudicial requiring a reversal.*

Here the jury heard Counsel for defendant request such an instruction, and heard the Court refuse it, with the comment, "for I think it is elementary" (R. 1726). That jury had a perfect right, under the circumstances, to conclude that the failure of the defendant to testify did create a presumption against him, and undoubtedly did so conclude. That jury deliberated more than six hours before the Court gave the charge that should have properly been given before the jury deliberated for even one instant. It is altogether reasonable to assume that during

[36] The court ultimately charged substantially in the language of the charge approved in the *Bruno* case, *supra*.

[37] 28 U. S. C. A. 632.

[38] The Court gave this part of the instructions 6 hours later. This could not be effective as it already entered into the jury's discussions and deliberations.

that deliberative period of six hours, the fact that the defendant did not testify in his own behalf did illegally enter into the discussions and deliberations of the jury.

It is, indeed, psychologically difficult for the average juror to free his mind of prejudice against a defendant who fails to testify even when properly instructed; it is expecting too much from human nature, and a lay mind to presume that the statute, and the principles announced in the *Bruno* case, *supra*, were not unknowingly violated by the jurors by a discussion, during a long six hours, of the failure of the defendant to testify in his own behalf.

True, the court *belatedly* made a most praiseworthy attempt to correct the serious error that it had fallen into, but the courts have unanimously held that there should be a reversal where the error has been so serious that it likely affected the minds of the jury despite the attempted correction.

In analogous cases, where the admonition to disregard was given by the Court, the Appellate Courts have always insisted that the trial judge take *prompt* action, and in no case of this nature known to us has there been an approval of the action of the Court in attempting to correct a serious error when the correction was not made promptly.

Petitioner's sole defense was that he was not a party to the comprehensive conspiracy as laid in the indictment.[39]

[39] The question of whether this was a comprehensive conspiracy, or merely a series of smaller conspiracies among smaller groups of the defendants, or a series of disconnected acts was submitted to the jury. This is fully discussed under another heading herein.

The refusal of the judge to instruct the jury on the silence of the defendants, in this connection, could have been the decisive factor in the jurors' deliberations, on this, the crucial phase of the case. The later dramatic attempt to correct the error prefaced by a long preliminary discussion of the propriety of petitioner's counsel to request the charge, etc., could only have confused a very tired and worn out jury. Thus, considering the whole case, the error was so serious as to have affected the minds of the jurors.

The Circuit Court opinion, treating this type of error as a mere technical or formal one,[40] is in direct conflict with the important policy found to exist by this court in *Bruno v. U. S.*, 308 U. S. 287, in which this court said: "Is the disregard of the right which Congress gave to Bruno error, the commission of which we may disregard? We hold not * * *." To the argument that the matter was merely a technical error the court said: "Of a very different order of importance is the right of an accused to insist upon a privilege which Congress has given him."

In the *Kotteakos* case, *supra*, in discussing the effect of the harmless error statute (Section 269) this court said: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, *except perhaps when the departure is from a constitutional norm, or A SPECIFIC COMMAND OF CONGRESS.* (Citing Bruno case.)"

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[40] The court has apparently overlooked the fact that substantial justice is presumed to have been prevented when defendant is deprived of an important right provided for him in a specific Congressional mandate.

The *Bruno* case, *supra*, holds that it is reversible error for the Trial Court to deny any accused a privilege which Congress has allowed him, e. g., that the jury be charged that in *its deliberations it shall not discuss the fact that the defendant did not take the stand, and that his failure to testify shall not create any presumption against him.* This clearly implies that the instruction be given before the jury retires. The accused would not effectively be allowed the right when the instruction is only given six hours after the jury is worn out by long deliberations in a most complicated case; a case which even the Circuit Court alternatively expresses doubt of the correctness of the finding that petitioner was a party to the general conspiracy. Of what benefit is an instruction that the jury is not to use in its deliberations the fact of defendants' failure to testify if the instruction is not given before the jury retires?

The Objection and Bill Was Timely Noted.

Objection and bill of exception to the failure of the court to give this essential charge were timely noted. Petitioner and his counsel were not called upon to do more. *No earthly good came of the charge which told the jury that they were not to consider the defendant's failure to testify in their deliberations after they had done that for six hours.* This important point does not seem to have been considered by the Circuit Court. Nothing could have been gained by an objection to the Judge's belated charge. If an objection had been interposed there is nothing that the court could have corrected, the fundamental error was a *fait accompli;* the damage that had been already done was then irrevocable. It seems to us that it is a fallacy to

base failure to consider this as reversible error on the fact that the defendant did not object twice to this fundamental error of the trial court.

Accused was Entitled to Instructions before Jury Retired.

We submit that this court implied in the *Bruno* case that the defendant who requested the charge was entitled to have it given before the jury retired. *If this be not so, it seems to us that a way is left open to circumvent the clearly announced policy of Congress recognized by this Court in the Bruno case, supra.*

The Circuit Court says that after the jury had been out for several hours it came back into the court to ask a question, the Judge of his own motion stated to the jury that he had been in error in refusing the charge, and that he wished now to correct the error. It is significant that the court did not send for the jury and correct the error, but waited until the jury filed back into the court room at its own request to ask a question, *which question shows that the jury had made up its mind as to some of the defendants, there being question only as to those who were thought by the jury to have committed some acts after the mailing.* See (R. 1732), and only then did the court decide to correct the error.[41] The Circuit Court lays stress on the

[41] We think this is equivalent to instructing the jury only after the court has been informed that they are ready to return a verdict. The record shows the jury propounded this question (R. 1732): "Your Honor: We would like to have further instructions, there being *a transaction* closed, and *some of the defendants* did not know that the mails were being used until after the transaction was completed could *that party* be found guilty, or only those directly participating at the time." This question indicates that as to "some of the defendants" at least the jury had already decided that they were guilty. At any rate, the jury returned almost immediately with its guilty verdict.

fact that the judge, after several hours, gave a full and correct charge on the point, and the defendants neither excepted to its giving, nor asked further instructions. Of course, they did not. Why should they object, if the charge was full and correct and why should they object to his giving it? They were anxious to have the court minimize whatever damage had been done their clients as far as possible, and so they were right in not objecting. It does not logically follow from this that the damage that had already been done when the charge was peremptorily refused in the presence of the jury had been remedied.

The Circuit Court held against our contention that the correction of the error did not remove the effects of the error complained of. The court then speculates that this belated charge might have been of the greatest value to the jury, indeed of far more value than if given as a part of the general charge. We do not think so. We think that, as the stage was then set, it was an inopportune time for the court to call attention to the fact that the defendants had failed to testify. It could only have had the effect of prejudicing, reminding and confusing the mind of the jury. Entirely too much stress, emphasis and confusion was then made of the fact of defendant's failure to testify; it was juggled about too much for the safety of any defendant on trial relying on a strictly legal defense that he was not a part of a complicated conspiracy being then confronted by emotional effects on the jury—a defendant always being at a disadvantage from a prejudicial standpoint in a fraud case, especially when he elects not to testify.

We also submit that the holding of the Circuit Court is in conflict with decisions of this court, and with decisions of other Circuit Courts holding that *the correction of an error must be PROMPT to be effective.* The test of whether an admonition of the court cures an error depends on whether such a fixed impression was made on the minds of the jury by what proceeded, as to influence its verdict.[42]

The holding is particularly in conflict with the *Bruno* and *Kotteakos* cases, which decided that an error which violates a fundamental right (such as a constitutional right); or a specific command of Congress (such as the charge requested and refused in this case) is not to be treated in the same manner as a technical or formal error. This is particularly true as to petitioner where the facts of his guilt as a member of the conspiracy, especially as to the mailing on Count Four which has not been proven by any evidence at all, and where even the Government impliedly conceded that he was not connected with sixteen separate conspiracies which the Government proved in the District Court.

Discussion of the Law Re Effectiveness of Correction of Error by Court's Admonition to Jury.

Hibbard v. U. S., (7 Cir.) 172 F. 66, 71, the judgment was reversed because of remark by the Court to counsel for the accused while cross-examining witness, which remark intimated that letters in possession of accused should

[42] However it is not necessary to resort to this test when there has been a departure from a constitutional norm, or a specific command of Congress. In such a case the error is presumptively prejudicial. *Kotteakos v. U. S., supra.*

be produced; the Circuit Court held this to be in derogation of the constitutional right of the accused to furnish no evidence in aid of the prosecution, and that it was presumptively prejudicial in the inference thus left in the minds of the jurors when the letters were not brought in, citing *McKnight v. U. S.*, (6 Cir.) 115 F. 972, and cases cited therein.[43] *Grantello v. U. S.*, (8 Cir.) 3 F. (2d) 117, 120, 121, was reversed because the Court commented on defendant's failure to testify even though the defendant took the stand, but was only asked his name and no other question.

Test Stated as to When Admonition by Court Cures Error.

Frantz v. U. S., (6 Cir.) 62 F. (2d) 737, 739, held that where Judge erred by showing bias during trial that a charge admonishing jury to disregard this would not operate to remove from the minds of the jurors what had gone before. Likewise, the language in *Pharr v. U. S.*, (6 Cir.) 48 F. (2d) 767, 770, shows that the test of whether the admonition of the Court cures an error depends on whether such a fixed impression was made on the minds of the jury by what preceded as to influence its verdict. Especially analogous to this case is the situation arising when there has been an abuse of argument by counsel. The test is well stated in *Volknor v. U. S.*, (6 Cir.) 13 F. (2d) 594, as follows:

> "Whether there has been a correction of the abuse of argument by a withdrawal of the objectionable

[43] The refusal to give the instruction with the added comment "that it is elementary" was tantamount to a remark in the presence of the jury that a presumption could be indulged in because of defendants' failure to testify.

parts of it depends upon whether on considering the whole case the error appears to have been so serious that it likely affected the minds of the jury despite the attempted correction by counsel or court. Waldron v. Waldron, 156 U. S. 361; Graves v. U. S., 150 U. S. 118; Wilson v. U. S., 149 U. S. 60. It is true that in Chadwick v. U. S., 141 F. 225, Dunlop v. U. S., 165 U. S. 486, and a number of other cases, it has been held that, if an objection is made to an improper argument, and the court sustains the objection,[44] or counsel withdraws the improper remark, the error will generally be deemed to be cured. **If, however, upon a consideration of the whole case, the error appears so egregious as to have affected the minds of the jury, despite the attempted correction, the verdict must be set aside."** (Emphasis supplied.)

Chadwick v. U. S., (5 Cir.) 117 F. (2d) 902, 905, held that improper remark of prosecuting attorney could be cured by a *"prompt instruction"* to the jury to disregard the remark. It is significant that the Court uses the adjective *prompt*. The case of *Barnes v. U. S.*, (8 Cir.) 8 F. (2d) 832, 834, is important as showing a situation wherein the prosecutor only indirectly commented on the failure of the accused to testify by stating that the testimony of the Government witness was not contradicted,[45] the Court *promptly*[46] ruled that such argument was highly improper. Notwithstanding this the Court reversed on the ground that the statement of the prosecutor disqualified the jury.

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[44] This, of course, implies prompt action by the court in sustaining the objection; in our case, the court overruled the objection.

[45] The only person who could have made the contradiction in the case was the accused as he was the only one present at the occurrence.

[46] Note that the correction must be *"prompt"* to be effective.

Another case where the District Attorney made only an indirect reference to the failure of the defendant to testify is *De Mayo v. U. S.*, (8 Cir.) 32 F. (2d) 472. How the Court must deal with such action to prevent reversible error was stated to be as follows:

> "Such reference is reversible error unless the court sharply, emphatically, and **promptly** [47] advises the jury that the matter was improper and that they should give no consideration thereto. This should be done in unmistakable and positive terms. To that extent at least, if not to a greater extent, counsel should be rebuked. This is one of the most damaging acts on the part of a prosecutor that can be committed in the course of a trial, not only from the standpoint of the defendant, but because of its effect upon the case generally, and should not be condoned. We do not think that the court in this case dealt strongly enough with the situation." [48]

Middleton v. U. S., (8 Cir.) 49 F. (2d) 538, 540, is another case wherein the Appellate Court held that prejudice against the defendant was not removed by withdrawal of certain inadmissible evidence and by instructing the jury to disregard it.[49] For an early case explaining the philosophy and reasons for the passage of the statute [50] which prohibits an unfavorable presumption on the failure

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[47] Here again note the insistence by the appellate court on *"prompt"* action by the court. It could hardly be said that the court acted promptly in this case. Had the jury not returned for further instruction on a different subject matter it is more than likely that the instruction would not have been given at all.

[48] If such action is so damaging when done by the prosecutors, *a fortiori* it is immeasurably more damaging when done by the judge as the weight of his great influence *ex necessitate rei* affects the minds of the jury.

[49] The defendant was asked about arrests and convictions for misdemeanors.

[50] 28 U. S. C. 632.

of the accused to testify, see *Wilson v. U. S.*, 149 U. S. 60. There are many cases showing instances where the evidence improperly admitted is so prejudicial that even instruction of court to disregard is insufficient to correct error, some of them are as follows: *Lockhart v. U. S.* (9 Cir.) 35 F. (2d) 905, 906; *Looker v. U. S.*, (2 Cir.) 240 F. 932, 935; *Waldron v. Waldron*, 156 U. S. 361, 363; *Throckmorton v. Holt*, 180 U. S. 552.

Résumé.

It is, therefore, clearly evident that the Judge's belated charge did not correct the error complained of under this heading because:

(1) The *Bruno* case, *supra*, held that the defendant was entitled to the charge by Congressional command, and the failure to give it on request was presumptively prejudicial.

(2) The laudible attempt on the part of the trial Judge to correct the error came too late. It has been uniformly held that where serious error had been committed, its correction, to be effective, must be *prompt*.

(3) The circumstances under which this was committed, and the later attempt to correct it created such a fixed impression of the minds of the jury as to influence its verdict.

(4) The error was so serious that it likely affected the minds of the jury, despite the attempted correction by the Court.

(5) It is improper for the jury to even consider the defendant's failure to testify in its discussions or deliberations. The jury in this case were free to do just that for more than six hours, and were thus disqualified psychologically to render a verdict without violating the congressional enactment [51] and the Constitution of the United States.[52]

(6) The jury should not have been permitted to deliberate for one instant without the benefit of the instructions requested under this heading. The *Bruno* case held that this section [51] does not merely legislate against the psychological operation of the jury's mind, but lays down canons of judicial administration for the trial judge, and impliedly directs the judge to guide the jury by indicating the considerations relevant to the verdict on the facts.

This Court further held in the *Bruno* case that this was not a mere "technical error" which appellate court should disregard, but was reversible error which deprived petitioner of a right which Congress gave to him.

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[51] 28 U. S. C. 632 providing that in the trial "the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such a request shall not create any presumption against him."

[52] The Fifth Amendment providing that "No person . . . shall be compelled in any criminal case to be a witness against himself."

CONCLUSION.

For the foregoing reasons, petitioner, by his counsel, respectfully prays that writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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APPENDIX.

Chart of Testimony of Witnesses Showing Transaction on Which No Evidence Was Adduced, Either Direct of Circumstantial, That Petitioner Participated in or Had Knowledge Of.

	Name of Witness	Place Where Sale or First Contact Made	Approximate Date of Sale, or First Contact	Appellants Shown To Be Involved in Making Sale or Sales
1.	Clifton (R. 787)	Jackson, Miss.	Feb. 1941 (R. 788)	Safir, Diaz.
2.	Hershey (R. 804)	Gulfport, Miss.	1937 (R. 812)	Kahn & Levy.
3.	Daigre (R. 815)	Baton Rouge, La.	Spring, 1941 (R. 815)	Kahn & Levy, Bergin, Safir.
4.	Koch (R. 848)	Poplarville, Miss.	Sept. 1938, Ex. 121 (R. 1954)	Kahn & Levy.
5.	Harper (R. 1056)	Meridian, Miss.	May, 1937, Ex. 723 (R. 2054)	Kahn, Levy, Baker, Overgard, Diaz.
6.	Northrop (R. 1092)	New Orleans, La.	Jan. 1941 (R. 1092)	Manzella, Bergin.
7.	Rosmussen (R. 1123)	Roseland, Fla.	May 1941 (R. 1128)	Safir, Kahn, Levy.
8.	Cuccia (R. 1159)	Jefferson Parish, La.	July 1941 (R. 1159)	Kahn, Manzella, Levy.
9.	Bergerie (R. 629)	New Iberia, La.	Spring 1942 (R. 642)	Safir, Diaz, Johnson.
10.	Allen (R. 332)	Pass Christian, Miss.	April 1937, Ex. 140 (R. 1985)	Baker, Kahn, Levy.
11.	Dupre (R. 396)	Slidell, La.	June 1941 (R. 400)	Safir, Levy & Kahn.
12.	Kahlert (R. 464)	New Orleans, La.	Dec. 1941 (R. 480)	Levy, Kahn.
13.	Smith (R. 497)	Hattiesburg, Miss.	May 1938 (R. 513)	Kahn, Levy, Bergin, Bird.
14.	Koenig (R. 531)	Westwego, La.	Jan. 1941 (R. 532)	Safir, Bergin.
15.	LeJeune (R. 553)	New Orleans, La.	Aug. 1940 (R. 561)	Kahn, Levy, Johnson, Diaz, Bergin.
16.	Prejean (R. 596)	Lafayette Parish, La.	Aug. 1939 (R. 606)	Bird, Johnson.

Chart of Testimony of Witnesses Showing Transactions Participated in by Petitioner.*

	Name of Witness	Place Where Sale or First Contact Made	Approximate Date of Sale, or First Contact	Appellants Shown To Be Involved in Making Sale or Sales
1.	Coleman (R. 1422)	New Orleans, La.	March 1938 (R. 1423)	Silverman, Baker, Bird, Diaz & Kiefer.
2.	Carter (R. 356)	Horton, La.	Oct. 1937 (R. 359)	Silverman, Kiefer, Kahn & Baker.
3.	Breisacher (R. 674)	New Orleans, La.	Nov. 1939 (R. 683)	Silverman, Bird, Johnson, Diaz, Safir, Kahn, Levy, Overgard.
4.	Duling (R. 891)	Jackson, Miss.	Apr. 1941 (R. 915)	Silverman, Johnson, Safir, Diaz.
5.	Matthews (R. 964)	New Orleans, La.	Sept. 1940 (R. 966)	Silverman, Safir, Johnson, Diaz, Overgard.
6.	Rowe (R. 996)	Memphis, Tenn.	1938 (R. 997)	Silverman, Diaz, Kiefer.
7.	Borges (R. 1104)	New Orleans, La.	1938 (R. 1105)	Silverman, Kiefer, Diaz.
8.	Fowler (R. 1183)	Pensacola, Fla.	1937 (R. 1186)	Silverman, Baker, Kiefer, Overgard, Diaz, Bergin.
9.	White (R. 1369)	Pensacola, Fla.	1938 (R. 1372)	Silverman, Johnson, Bergin, Diaz, Levy, Kahn, Kiefer.

* The record will show that petitioner did not have anything to do with the transactions of the others except in the cases of Bressacher, when he visited her with defendant, Johnson; Carter, whom he visited at one time with defendants Baker, Keifer (his business partner) and Kahn. There is circumstantial evidence that he collaborated with Johnson in the transaction with Matthews and Duling. There is also some circumstantial evidence of a connection with Diaz in the Rowe, Borges and Duling transactions and with Bird in the Coleman transactions. Many of the defendants named above visited the "person to be defrauded" as late as one or two years after petitioner made the sales, and petitioner had no knowledge of their transactions.